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Administration of justice at the United Nations

Administration of justice in the Secretariat

Report of the Secretary-General*

Summary

The present report is submitted pursuant to the request of the General Assembly in section XI of its resolution 55/258 of 14 June 2001. In response to that request, the report outlines the status of consideration of certain aspects of the administration of justice in the Secretariat, including the role of the Joint Appeals Board and the outcome of its work, as well as the establishment in the Secretariat of an ombudsman function. The report also considers the request of the Assembly, in the same resolution, that the Secretary-General take the necessary measures to "close the gap", as appropriate, between the statutes of the United Nations Administrative Tribunal and the Administrative Tribunal of the International Labour Organization with respect to specific performance of an obligation and compensation limits.

* The present report is being submitted at this time owing to the need to complete the consultation process with staff and management on the issue of the administration of justice.

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1. In its resolution 55/258 of 14 June 2001, the General Assembly considered certain aspects of the internal system of justice in the United Nations, welcomed the Secretary-General's proposals for establishing a function of ombudsman and providing legal training courses to new members of the Joint Appeals Board (JAB) and Joint Disciplinary Committee (JDC) and requested the Secretary-General to review other aspects, including the role of the JAB and the difference between the statutes of the United Nations Administrative Tribunal (UNAT) and the Administrative Tribunal of the International Labour Organization (ILOAT) with regard to specific performance of an obligation and compensation limits, and to report thereon to the Assembly at its fifty-sixth session. The present report is submitted pursuant to that request.

I. Role of the Joint Appeals Board

2. In section XI, paragraph 4 of resolution 55/258, the General Assembly requested the Secretary-General to submit a report, after consultations with the staff, on the possible amendments to the Staff Rules and Regulations to review the role of the Joint Appeals Board, taking into account the following four options:

(a) To maintain the JAB as an advisory body, subject to four changes;

(b) To maintain the JAB as it currently functions;

(c) To change the JAB from an advisory body to a semi-judicial body with the power to take decisions;

(d) To effect other changes that might flow from staff consultations.

A. First option: maintain the Joint Appeals Board as an advisory body, subject to four changes

3. The **first change** mentioned in the resolution is that members representing the staff should be elected solely by the staff, without prejudice to the right of the Secretary-General to appoint members representing the Administration. In practice, this is already the situation under staff rule 111.1, which provides for election by the staff of a number of members equal to the number appointed by the Secretary-General.

4. The **second change** mentioned in the resolution consists of two elements: the first relates to the **selection** of the chairpersons; the second to the consideration whether there is a need for a **full-time chairperson**.

5. Under the first element the JAB chairpersons would be jointly selected by staff and management. This reflects current informal practice and would only have to be formalized through an amendment to staff rule 111.1 (b) (i). To that end, the text of a proposed amendment to staff rule 111.1 (b) (i) is contained in annex I to the present report.

6. The second element requires examination of whether there is a need for a full-time chairperson. Possible advantages of a full-time chairperson would be to enhance the continuity and consistency of JAB reports and to ensure the immediate availability of someone fully trained and familiar with the functions. However, continuity and consistency are already addressed by the institution of a presiding officer of the JAB and the provision of technical advice by the JAB secretariat. With respect to immediate availability, experience shows that delays in constituting JAB panels are not caused by the lack of chairpersons, who are sufficiently numerous to participate in panels as required, but by the lack of available members elected by the staff. A full-time chairperson would not cure that problem. The Secretary-General is therefore convinced that there is no need or justification for requesting the endorsement of the General Assembly for the additional funding that would be required for the establishment of a full-time chairperson (usually at the P-5 level or above) for each of the standing JABs in New York, Geneva, Vienna and Nairobi.

7. The **third change** mentioned in the resolution relates to the current power of the JAB to suspend action on a contested decision. Currently, decisions on requests to suspend an administrative decision are taken by the Under-Secretary-General for Management on behalf of the Secretary-General after consideration and advice by the JAB. The decisions on requests for suspension of action are not subject to appeal.[1]

8. Giving the JAB the authority to decide, rather than advise, on whether an administrative decision should be suspended would represent a radical change raising a major constitutional issue. In accordance with Article 97 of the Charter of the United Nations, the Secretary-General is the chief administrative officer of

the Organization and may not be bound by decisions made by staff who are under his authority (see paras. 15-21 for a discussion of this issue). The Secretary-General, therefore, would not support a change in the current power of the JAB to suspend action on a contested decision.

9. The **fourth change** would limit the time available for the JAB to produce its report and recommendations to three months from the date of receipt of the appeal.

10. The purpose of the change is clearly to prevent the long delays currently experienced from the time an appeal is submitted to the JAB until it issues its report. In many cases, this period may exceed one, sometimes two years. It is important to recall that delays may occur at several stages:

(i) Upon receipt of an appeal, the JAB secretariat forwards it to the respondent (i.e., the designated representative of the Secretary-General) for reply. Under staff rule 111.2 (g), the respondent has two months to do so.

In reality, the respondent (in New York, the Office of Human Resources Management) must regularly request an extension of this statutory time limit, due to insufficient resources to deal with all appeals on a timely basis, while giving first priority to disciplinary cases.

(ii) The JAB transmits a copy of the respondent's reply to the appellant, who will often submit comments on the reply. These comments are transmitted to the respondent who, typically, will respond only if the comments contain new arguments or facts. The appellant may make another written submission afterwards if there is a response by the respondent. All these exchanges may add several weeks, or even months, to the process.[2]

(iii) Once all the written pleadings are completed, a JAB panel is constituted to consider the appeal. This may take several weeks, sometimes longer.

(iv) The JAB panel may decide to consider the case with or without a hearing. Holding a hearing typically adds one or more weeks to the process. Complex cases may require a longer time, especially when the panel needs additional information which may be difficult and/or time-consuming to obtain. There is no statutory limit, only the provision in staff rule 111.2 (m) that, in considering an appeal, the panel shall act with the maximum dispatch consistent with the review of the issues before it.

(v) The JAB panel prepares its report and recommendations.

Stages (iii), (iv) and (v) are also frequently delayed because of lack of resources in the JAB secretariat, which does not have a sufficient number of alternate secretaries to assist the JAB panels in their work, or because there are not enough available JAB members, or because of the complexity of some cases.

(vi) The case is then transmitted to the Under-Secretary-General for Management for final decision. Under staff rule 111.2 (p), the decision is normally within one month after the JAB panel has forwarded its report.

Delays may also occur at this stage when the Under-Secretary-General for Management receives reports in unusually high numbers or on cases of particular complexity involving issues that require additional fact-finding and research.

11. Introducing a requirement that the JAB produce its report within three months of the date of receipt of the appeal would not appear to be in the best interests of any of the parties, nor would it be realistic at this point, given the lack of adequate resources. The Secretary-General shares the concern expressed by the staff and the General Assembly about the delays in the appeals process. He considers it essential to obtain a systematic review of the process in order to identify where the bottlenecks are, and to develop solutions accordingly. He has therefore requested the Office of Internal Oversight Services to conduct a management review of the entire appeals process to that effect.

B. Second option: maintain the Joint Appeals Board in its current form

12. The second option mentioned in the resolution is to maintain the current status of the JAB.

13. The core element of the JAB is peer review by an advisory body. Peer review is a very important feature, which is one of the preferred solutions among a variety of alternative dispute resolution mechanisms, which are being developed in many countries. The procedure in

place at the United Nations also includes the selection of members by the staff representative bodies, which is not always the case in other peer review systems. This does not mean that the current system functions perfectly, but the problems derive for the most part from a lack of adequate resources. The solution therefore should address that issue while preserving the essential features of the current system, which themselves do not appear to be the problem.

14. The advisory nature of the JAB recommendations is based on the Charter (see paras. 15-21). The provision of training for JAB/JDC members would ensure that the reports and recommendations can more consistently be accepted by the Secretary-General. The Secretary-General therefore endorses the option of maintaining the JAB in its current form, while at the same time endorsing the additional corrective measures referred to above, such as additional training for the JAB members and conducting a management review to identify the bottlenecks in the appeals system.

C. Third option: changing the nature of the Joint Appeals Board from an advisory body to a semi-judicial body with the power to take decisions

15. This option was the basis for the Secretary-General's proposals for the reform of the internal justice system in 1994 and 1995.[3] As explained at the time, the proposals were developed with a view to preserving fully the authority of the Secretary-General as chief administrative officer of the Organization, which flows from Article 97 of the Charter. This precludes the possibility of having staff members, who are subject to the Secretary-General's authority under staff regulation 1.2 (c), from making decisions binding upon him. Accordingly, it was proposed to replace the JAB composed of staff members by a body of professional arbitrators who would not be "staff members" but "officials".[4] This change would have required extensive amendments to the Staff Regulations and Rules, as well as to the statute of the Administrative Tribunal.[5]

16. The proposal to replace the existing Joint Appeals Board by an arbitration board composed of "officials" who would not be staff members and could therefore legally make decisions binding on the Secretary-General was closely reviewed. It generated a number of negative comments. The Administrative Tribunal explained that the JAB system,

> "because it ordinarily utilizes individuals experienced and knowledgeable regarding the unique features of United Nations staff relationships, thus starts with an important advantage in dealing with issues presented to it and in formulating recommendations. This is of considerable value, not only from the standpoint of staff confidence and informed advice to the Secretary-General, but also owing to the insights and assistance available to the Tribunal from JAB reports."[6]

Subsequently, the Tribunal expressed the view that the JABs, on the whole, had been performing commendably and had made a valuable contribution to the system of justice within the United Nations.[7] The Tribunal favoured a phased approach to reform, which would give an opportunity to assess the effectiveness of less extreme and less costly measures, such as the introduction of an ombudsman system. A phased approach would permit an evaluation of the manner in which each measure might affect the others,[8] and would allow for a more informed judgement to be made as to whether there was a need for any other structure and, if so, what its contours should be.[9] As to the cost implications, the Tribunal indicated that, in the United States of America, for example, it was not uncommon for experienced arbitrators to charge fees of the order of $1,500 per day (this was in 1995), plus expenses, to which should be added the cost of producing transcripts of hearings and the cost of travel, daily allowances and interpretation/translation for arbitrators from abroad who would be retained to ensure equitable geographical distribution.[10]

17. The Advisory Committee on Administrative and Budgetary Questions gave great importance to the views of the Administrative Tribunal, including its concerns about the real costs of the proposal. The Committee pointed out that progress had already been made in the expeditious processing of cases and that the proposals relating to early reconciliation and resolution of disputes should go a long way towards minimizing the actual number of matters referred to formal proceedings.[11] The Committee believed that a number of measures, such as fostering conciliation and early resolution of disputes, strengthening the offices handling the appeals and providing advice to staff members, and simplification/rationalization of existing

administrative and personnel practices, should address in a positive way the existing problems and shortcomings. It concluded that those changes should be evaluated after a reasonable period of implementation, with a view to determining what further measures might be necessary.[12] The Committee did not support the proposed replacement of the JAB.

18. The United Nations Staff Union also expressed a number of reservations[13] and indicated in a statement to the Fifth Committee that it had to withdraw support for the proposed reforms because it believed that staff members should have the right to have their cases heard by their peers.[14]

19. After extensive consideration of the Secretary-General's proposal in the Fifth Committee, the General Assembly, on the recommendation of the Fifth Committee, invited the Sixth Committee to examine the legal implication of the proposal.[15] In the Sixth Committee, the contention that participation of the staff in the JAB and the JDC was a source of inefficiency and delay was disputed and the validity of that contention as a reason for replacing those bodies was rejected. Among the criticisms of the proposed system, serious doubts were expressed about the suitability of arbitration within the Organization and about the recruitment of arbitrators from outside the United Nations, as they would lack the benefit of familiarity with the special regime pertaining to United Nations staff.[16]

20. In the end, the Under-Secretary-General for Management informed the Fifth Committee that, in view of the comments made, the entire question of arbitration would have to be rethought and fresh proposals would have to be prepared, consisting of elements that would work together and reinforce one another.[17]

21. The constitutional obstacle preventing staff members from rendering decisions binding on the Secretary-General remains. This problem can be resolved only by replacing the JAB with a new body which would not be composed of staff members. In view of the negative reactions to the proposal to do so only a few years ago, this does not seem to be a viable option. At this point, the Secretary-General proposes to maintain the positive elements of the current system, that is, advice provided by a joint body of peers, and to rectify the problems currently experienced by that system.

D. Fourth option: other changes flowing from staff consultations

22. The Secretary-General consulted extensively with staff on matters pertaining to the administration of justice. A working group of the Staff-Management Coordination Committee (SMCC) met in New York from 26 February to 2 March 2001 and its report was considered further by the Committee itself, which met also in New York from 4 to 11 October 2001. In both instances, the discussions were carried out in a constructive and collaborative spirit, resulting in several SMCC agreements in respect of particular aspects of the internal system of justice, including in respect of the terms of reference of the ombudsman (see paras. 27-29 below and annex II to the present report); the desirability of a uniform time limit for conducting administrative reviews (see para. 23); and the need to continue the dialogue between staff and management in this area. With respect to the role of the JAB, the Committee reached the following agreements:

(a) Statistical information would be provided by the JABs/JDCs to monitor trends in the administration of justice. This agreement is also in line with General Assembly resolution 55/258, in which the Assembly requested the Secretary-General to submit annual reports on the outcome of the work of the Joint Appeals Board;

(b) An administrative issuance would be promulgated to codify the practice concerning acceptance of unanimous recommendations of the JABs/JDCs;

(c) There would be free choice of counsel, including outside counsel, in the interest of equal representation of both parties at the JAB/JDC level. In addition, the Secretary-General recalls that, as of recently, staff members of the Office of Legal Affairs who are not involved in the preparation of cases for submission to the United Nations Administrative Tribunal are now allowed to act as counsel to staff members, and the bar has been removed against separated staff members other than retirees acting as counsel. Staff who do not wish to avail themselves of these newly available resources and wish to retain outside counsel may do so at their own expense. The relevant text of the Secretary-General's proposed amendments to staff rules 110.4, 110.7, 210.1, 310.1 and 111.2 is contained in annex I to the present report;

(d) Official recognition would be given to the contribution of staff members who volunteer to serve on the various bodies of the administration of justice;

(e) Provision would be made in the Staff Rules that undue interference in the justice process will not be tolerated and would constitute misconduct. The relevant text of proposed amendments to staff rules 101.2, 201.2 and 301.3 is contained in annex I to the present report.

23. SMCC also considered a closely related subject matter, namely, the importance of conducting administrative reviews, thereby providing an opportunity for the Administration to evaluate contested decisions so as to avoid unnecessary appeals, as well as for decision makers to reconsider their decisions in the light of that evaluation.[18] The Committee considered the desirability of establishing a uniform two-month review period for staff serving at Headquarters and elsewhere and agreed that a decision on the length of a uniform time limit for conducting administrative reviews should be postponed until after the completion of the management review of the appeals process by the Office of Internal Oversight Services.

II. Outcome of the work of the Joint Appeals Board

24. In section XI, paragraph 5, of its resolution 55/258, the General Assembly also requested the Secretary-General to report to the Assembly on an annual basis on the outcome of the work of the Joint Appeals Board. Table 1 sets out information on the work of the JABs in New York, Geneva, Vienna and Nairobi for the years 2000 and 2001. Information on the Secretary-General's decisions on JAB reports is also provided.

Table 1
Number of appeals and suspension-of-action cases filed and disposed of by all JABs per year[a]

Standing JABs	*2000*	*2001*
New York: appeals filed	82	79
New York: appeals disposed of	56	79
Geneva: appeals filed	24	19
Geneva: appeals disposed of	37	11
Vienna: appeals filed	6	5
Vienna: appeals disposed of	1	7
Nairobi: appeals filed	8	12
Nairobi: appeals disposed of	9	8

[a] Disciplinary cases are also handled by the JAB secretariats and they are considered on a priority basis.

25. As can be seen from table 1, the number of appeals filed with the New York and Geneva JABs during 2001 slightly decreased over the year before. Another difference between the two periods concerns the number of cases disposed of by the Geneva JAB which, by 2001, had disposed of its significant backlog, as demonstrated by the high number of cases disposed of during 2000. Furthermore, the New York JAB and the Vienna JAB in 2001 disposed of significantly more cases in 2001 than during 2000. As to the number of pending appeals, it is effectively non-existent in the Vienna and Nairobi JABs, and rather modest in the Geneva JAB. However, the number of pending cases is a continuing problem for the New York JAB, which had in its docket some 140 pending appeals by the end of 2001. However, not all cases included in that number are ready for consideration by the JAB; indeed, the number of cases where all the exchange of written pleadings between the parties has been completed is 50.

Table 2
Breakdown of decisions by the Secretary-General on unanimous JAB recommendations on appeals and requests for suspension of action

Year	*JAB reports from*	*Total number of decisions on JAB reports*	*Total number of JAB unanimous recommendations*	*Total number of JAB unanimous recommendations fully accepted by the Secretary-General*	*Total number of JAB unanimous recommendations partially accepted by the Secretary-General*	*Total number of JAB unanimous favourable recommendations rejected by the Secretary-General*
2000	New York	56	49	34 (69%)	0	15 (31%)
	Geneva	16	16	15 (94%)	0	1 (6%)
	Vienna	2	2	2 (100%)	0	0
	Nairobi	9	8	8 (100%)	0	0
Total		**83**	**75**	**59 (79%)**	**0**	**16 (21%)**
2001	New York	61	59	41 (70%)	3 (5%)	15 (25%)
	Geneva	16	16	13 (81%)	3 (19%)	0
	Vienna	5	5	5 (100%)	0	0
	Nairobi	5	5	4 (80%)	0	1 (20%)
Total		**87**	**85**	**63 (74%)**	**6 (7%)**	**16 (19%)**

26. As can be seen from table 2, the percentage of full and partial acceptances, by the Secretary-General of the unanimous recommendations of the JABs is quite high (79 per cent during 2000, and 81 per cent during 2001). As for the percentage of the Secretary-General's rejections of unanimous JAB recommendations that were favourable to the appellants, it is relatively low in both periods and there is a slight decrease in 2001 (21 per cent in 2000, and 19 per cent in 2001). This is in line with the stated policy of the Secretary-General to normally accept unanimous recommendations unless there is a compelling reason of law or policy not to do so. In all such instances, the decisions of the Secretary-General provide detailed reasons for such rejection, which in most cases is attributable to the incorrect application of law or policy by the JAB or inadequate fact-finding that is not supported by the available evidence. With the increased training for the JAB/JDC members in the applicable law and policies of the Organization and the availability of the web-based repository of the recent jurisprudence of the Administrative Tribunal (encompassing jurisprudence on judgements rendered from 1980 onwards), it is hoped and expected that unanimous recommendations will be more reliably supported by the evidence, will be in accordance with the applicable law, and therefore possible to accept. The Secretary-General, however, would still have the discretionary authority to reject unanimous JAB recommendations in the interest of the Organization.

III. Ombudsman

27. In its resolution 55/258, the General Assembly welcomed the proposal of the Secretary-General to establish a function of ombudsman. SMCC also recommended that there should be a clear reporting line of the Ombudsman to the Secretary-General in order to preserve the independence and ensure the effectiveness of the function.

28. The Secretary-General has endorsed the SMCC recommendation that the terms of reference of the Ombudsman would be as set out in annex II to the present report. Moreover, the Ombudsman, while based at Headquarters, would service all duty stations, including field missions. As it is a new function, the Secretary-General considers it advisable to gain some experience and an appreciation of the volume of work involved in order to determine whether there is a need for additional support to the function, and if so, to develop a broader system in the light of the experience gained. Following the appointment of the first Ombudsman, all staff will be informed of the role and functions of the Ombudsman and of the ways in which they can bring matters of concern to his or her attention.

29. As had been indicated by the Secretary-General in his report of 1 August 2000, the establishment of the full-time function of the Ombudsman will strengthen the informal mediation process and, as a result, will replace the panels on discrimination and other grievances (A/55/253, annex V, para. 3). This view was also espoused by most staff representatives at the recent SMCC meeting.

30. The Secretary-General's proposal was that the post of the Ombudsman would be established at the D-2 level. However, the General Assembly, at its fifty-sixth session, decided to establish the position of Ombudsman at the level of Assistant Secretary-General in the Office of the Secretary-General, to be supported by a legal officer at the P-4 level, in place of the D-2 and the P-4 posts originally proposed under section 27A, Office of the Under-Secretary-General for Management.[19] The Secretary-General notes that the legal officer post at the P-4 level that will assist the Ombudsman had originally been proposed to provide legal backstopping to the Panel of Counsel. While the Secretary-General agrees that there is a need to provide adequate support to the Ombudsman, the necessity of strengthening the Panel of Counsel has not diminished. Therefore, the Secretary-General wishes to emphasize the continuing need of strengthening the Panel of Counsel, a need that has been recognized by both management and the staff, through the provision of a P-4 legal officer post.

IV. Training of members of the Joint Appeals Board and the Joint Disciplinary Committee

31. In section XI, paragraph 6, of its resolution 55/258, the General Assembly welcomed the intention of the Secretary-General to organize basic legal training courses for new members of the JABs and JDCs.

32. To that end, the Secretary-General is pleased to advise that the secretariat of the JAB and JDC at Headquarters organized three major training sessions for the members of the JAB and JDC during 2000 and 2001. The topics covered included issues concerning fixed-term appointments, promotions, the UNAT jurisprudence on those issues, the JAB rules of procedure, time limits, fact-finding, evidence, and so forth. In addition, the availability on the Intranet, as of November 2001, of the Case Digest and Jurisprudence Digest and Compendium of UNAT judgements (see also para. 34 below) will further facilitate the training of all JAB and JDC members, as well as of all other practitioners and staff at large.

33. The issue of training in the area of the administration of justice was also extensively discussed with staff at SMCC and its working group, who stressed the importance for such training to be given not only to the JAB/JDC members, but also to staff at large. In this regard, the Secretary-General considers that it is important to prioritize the training according to the most pressing needs. Rather than developing a multiplicity of training programmes at the same time, which would be very costly and time-consuming, the Secretary-General intends, as a first stage, to focus on the duty station having the greatest number of cases and the greatest number of practitioners involved in the justice system, that is, New York, where the initial training programme would be targeted to the needs and requirements of JAB and JDC members, Panel of Counsel members, as well as human resources and administrative officers, subject to the approval of additional resources. Training programmes for the

same categories of staff at offices away from Headquarters and in field missions would be developed and conducted subsequently, in the light of the experience gained from the training programme at Headquarters, also subject to the approval of additional resources.

34. Further agreements that were reached at SMCC in the area of training, and which were subsequently approved by the Secretary-General, include:

- Ensuring that induction courses for new staff members include information on the Organization's internal system of justice, on the dispute resolution mechanisms that are available to staff and on their due process rights;
- The development of a case digest of UNAT judgements that would be made available to all practitioners, including Staff Councils. The Secretary-General is pleased to advise that a new web site containing a Case and Jurisprudence Digest of Administrative Tribunal Judgements rendered from 1980 onwards was posted on the Headquarters Intranet (under Staff Services) in November 2001;
- Ensuring that every effort is made to identify internal resources prior to seeking external resources in connection with training in the administration of justice.

V. Differences between the statutes of the Administrative Tribunals of the United Nations and the International Labour Organization

35. In section XI, paragraph 7, of its resolution 55/258, the General Assembly took note of the observations of the Advisory Committee on Administrative and Budgetary Questions that there was "a gap" between the statutes of the United Nations Administrative Tribunal and the Administrative Tribunal of the International Labour Organization with respect to specific performance of an obligation and compensation limits, and requested the Secretary-General to take necessary measures to "close the gap" as appropriate between the statutes of the two Tribunals.

36. Article 10 of the UNAT statute provides:

> "1. If the Tribunal finds that the application is well founded, *it shall order the rescinding of the decision contested or the specific performance of the obligation invoked*. At the same time, the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his or her case, provided that such compensation shall not exceed the equivalent of two years' net base salary of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, *order the payment of a higher indemnity*. A statement of the reasons for the Tribunal's decision shall accompany each such order." (emphasis added)

37. The corresponding article in the statute of the ILOAT, article VIII, reads as follows:

> "In cases falling under article II, the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. *If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation* for the injury caused to him." (emphasis added)

38. Therefore, the text of article 10, paragraph 1, of the UNAT statute does not pose any obstacles to the Tribunal's power to order specific performance or the rescinding of the contested decision, which is affirmed in the first sentence of the provision, which specifies that, "if the Tribunal finds that the application is well founded, *it shall order the rescinding of the decision contested or the specific performance of the obligation invoked*" (emphasis added). Both Tribunals are obliged, if they find a complaint well founded, to order the rescission of the impugned decision or the performance of the obligation relied upon. However, as stated in the 1987 report of the Secretary-General on the feasibility of establishing a single administrative tribunal:

> "... the two statutes contain substantially different provisions for the contingency that

rescission of performance might not be considered feasible or desirable:

"(a) In respect of ILOAT, it is the Tribunal itself that decides whether rescission or performance "is not possible or desirable", in which case it awards the applicant monetary compensation (not subject to any specific limit "...); however, in respect of the most sensitive situation, the reinstatement of a staff member, the ILO Administrative Tribunal has, in practice, only very rarely and in respect of lower-level officials, required such performance without giving the respondent organization the choice of paying compensation;

"(b) In respect of UNAT, the Tribunal must automatically fix, as part of its original judgement, an amount of compensation to be paid to the applicant (subject to a conditional limit ...), leaving it to the Secretary-General to decide, whether, "in the interest of the United Nations", he prefers to comply with the order for rescission or performance, or to pay the amount indicated by the Tribunal; in practice and especially in cases involving separation from service, he almost always chooses to pay the compensation rather than to grant reinstatement."[20]

Since the above report was issued, the Secretary-General has accepted to implement the order of UNAT to reinstate several staff members and/or comply with related orders in cases where this was found to be possible and consistent with his authority.[21]

39. In considering measures to align the statutes of the two Tribunals, the issue of specific performance should not be viewed in isolation. There are important differences between ILOAT and UNAT on a number of other points, notably the selection criteria and procedures of ILOAT judges and UNAT members. Although no specific qualifications are stated for either ILOAT judges or UNAT members, except that all on each Tribunal must have different nationalities, in practice UNAT members include persons of a wide variety of backgrounds, many having had some years of service as representatives to the General Assembly (some in its Fifth Committee), while ILOAT is staffed by professional judges from the highest levels of national court systems. Under article III, paragraph 1, of its statute, ILOAT shall consist of three judges and four deputy judges, who shall all be of different nationalities. Article 3, paragraph 1, of the UNAT statute, as amended by the General Assembly in its resolution 55/159 of 12 December 2000, requires that UNAT members "possess the requisite qualifications and experience, including, as appropriate, legal qualifications and experience".

40. ILOAT judges are appointed by the International Labour Conference, after nomination by the Director-General of ILO and following consultations with the ILO Staff Union and with the other organizations subject to the Tribunal; these nominations are submitted to the ILO Governing Body, which endorses them for submission to the ILO Conference, which approves them without discussion. By contrast, UNAT members are nominated by Governments, and their election in the Fifth Committee is confirmed by the General Assembly.

41. There are also other differences between the practices relating to the two tribunals, including in respect of, e.g., the mode of compensation of ILOAT judges and UNAT members.

42. The Secretary-General would be prepared to reconsider his position on the question of specific performance if the statutes and practices of the two tribunals were fully harmonized.

43. Alternatively, the current system could be retained with an increase in the limit of compensation to be paid should the Secretary-General decide, in the interest of the United Nations, that the applicant should be compensated without further action. The current two-year limit could be raised to three years in article 10.2 of the UNAT statute. As is the case at present, the Tribunal would retain the authority to order payment of a higher indemnity in exceptional cases, giving a statement of the reasons for such a decision.

Notes

[1] Staff rule 111.2 (c).

[2] Article K.1 of the JAB rules of procedures only contains a general provision indicating that the time for additional submissions by the parties, i.e., submissions other than the statement of appeal and the respondent's reply, "shall generally be no more than two weeks in respect of appellants stationed in New York, or one month for appellants elsewhere". This general two-week limit is not systematically respected or enforced. Moreover, the provision appears to give each party two weeks to reply to any additional submissions by the other party, without limiting the number of such submissions.

[5] A/C.5/49/13, A/C.5/49/60 and A/C.5/50/2.

[6] A/C.5/50/2, para. 12.

[7] These changes were set out in annexes I and III to A/C.5/50/2.

[8] A/C.5/49/60/Add.2, annex, para. 5.

[9] A/C.5/50/2/Add.1, annex I, para. 7.

[10] A/C.5/49/60/Add.2, annex, para. 12.

[11] Ibid., para. 14.

[12] Ibid., para. 6.

[13] A/50/7/Add.8, para. 38.

[14] Ibid., para. 40.

[15] See A/C.5/50/2/Add.1, annex II.

[16] A/C.5/51/SR.31, para. 73.

[17] General Assembly resolution 50/240, para. 2.

[18] See A/C.6/51/7, annex.

[19] A/C.5/51/SR.31, paras. 57-62.

[20] See also the report of the Secretary-General, A/55/253, annex V, para. 4.

[21] General Assembly resolution 56/253, para. 79.

[22] A/42/328, para. 50.

[23] Judgements No. 482, *Qiu, Tao, Zhou* (1990); No. 807, *Lehmann* (1996).

Annex I

Proposed amendments to Staff Rules

- With reference to paragraph 5 of the report:

Rule 111.1

Establishment

(b) Each Joint Appeals Board shall be composed of:

(i) Chairpersons appointed by the Secretary-General **after selection** ~~from among a list presented~~ by the joint staff/management machinery in respect of the staff representative body or bodies at the duty station at which the Board is established;

(ii) Members appointed by the Secretary-General;

(iii) An equal number of members elected by ballot of the staff under the jurisdiction of the Board.

...

[Appendix II to the 200 series and Appendix E to the 300 series will be changed accordingly.]

- With reference to paragraph 22 (c) of the report:

Rule 110.4

Due process

(a) No disciplinary proceedings may be instituted against a staff member unless he or she has been notified of the allegations against him or her **and** ~~, as well as~~ of the right to seek the assistance **of counsel** in his or her defence, ~~of another staff member or retired staff member~~ and has been given a reasonable opportunity to respond to those allegations.

...

Rule 110.7

Joint Disciplinary Committee procedure

...

(d) A Joint Disciplinary Committee shall permit a staff member to arrange to have his or her case presented before it by **counsel** ~~any other staff member or retired staff member~~ at the ~~same~~ duty station where the Committee is established.

Rule 210.1

Disciplinary measures

(a) In any case involving possible disciplinary action, the Secretary-General may establish, on an ad hoc basis, machinery to advise him **or her** before any decision is taken.

(b) No disciplinary proceedings may be instituted against project personnel unless the individual concerned has been notified of the allegations against him or her and of the right to seek the assistance of counsel in his or her defence, and has been given a reasonable opportunity to respond to those allegations.

Rule 310.1

Disciplinary measures

...

(d) No disciplinary proceedings may be instituted unless the staff member has been notified of the allegations against him or her and **of the** ~~his or her~~ right to seek the assistance **of counsel** in his or her defence ~~of another staff member or retired staff member~~, and has been given a reasonable opportunity to respond to the allegations.

Rule 111.2

Appeals

...

(i) A staff member may arrange to have his or her appeal presented to the panel on his or her behalf by **counsel**. ~~another serving or retired staff member. The staff member may not, however, be represented before the panel by any other person~~.

...

[Appendix II to the 200 series and Appendix E to the 300 series will be changed accordingly.]

• With reference to paragraph 22 (e) of the report:

Rule 101.2

Basic rights and obligations of staff

Specific instances of prohibited conduct

...

(j) Staff members shall not unduly interfere or seek to interfere in the proper establishment or the functioning of the joint bodies established under articles X and XI of the Staff Regulations to advise the Secretary-General on

disciplinary matters or on appeals by staff members against an administrative decision. Similarly, staff members shall not unduly influence or attempt to influence any individual participating in the process in the exercise of his or her functions. Nor shall any staff member threaten, retaliate or attempt to retaliate against such individuals or against staff members exercising their right to appeal against administrative decisions.

[Current paragraphs (j) to (s) would be renumbered (k) to (t).]

Rule 201.2

Basic rights and obligations of project personnel

Specific instances of prohibited conduct

...

(j) Project personnel shall not unduly interfere or seek to interfere in the proper establishment or the functioning of the joint bodies established under articles X and XI of the Staff Regulations to advise the Secretary-General on disciplinary matters or on appeals by staff members against an administrative decision. Similarly, project personnel shall not unduly influence or attempt to influence any individual participating in the process in the exercise of his or her functions. Nor shall any project personnel threaten, retaliate or attempt to retaliate against such individuals or against staff members or project personnel exercising their right to appeal against administrative decisions.

[Current paragraphs (j) to (s) would be renumbered (k) to (t).]

Rule 301.3

Basic rights and obligations of staff

Specific instances of prohibited conduct

...

(j) Staff members shall not unduly interfere or seek to interfere in the proper establishment or the functioning of the joint bodies established under articles X and XI of the Staff Regulations to advise the Secretary-General on disciplinary matters or on appeals by staff members against an administrative decision. Similarly, staff members shall not unduly influence or attempt to influence any individual participating in the process in the exercise of his or her functions. Nor shall any staff member threaten, retaliate or attempt to retaliate against such individuals or against staff members exercising their right to appeal against administrative decisions.

[Current paragraphs (j) to (s) would be renumbered (k) to (t).]

Annex II

Proposed terms of reference of the Ombudsman

• From paragraph 28 of the report:

1. An Ombudsman shall be appointed at Headquarters at the Assistant Secretary-General level by the Secretary-General, after consultation with the Staff Associations/Councils, starting in 2002.

2. The Ombudsman shall serve for a non-renewable five-year term and shall be ineligible for any other appointment in the United Nations after expiration of the term.

3. In the exercise of his/her duties, the Ombudsman shall be independent of any United Nations organ or official.

4. The Ombudsman, as a designated neutral, has the responsibility of maintaining strict confidentiality concerning matters that are brought to his/her attention, unless given permission to do otherwise. The only exceptions, at the sole discretion of the Ombudsman, are when there appears to be imminent threat of serious harm. The Ombudsman shall have direct access to the Secretary-General, as needed, for the performance of his/her functions.

5. The Ombudsman shall have access to records concerning staff. The exceptions to this are medical records that are not available without the express request of an individual, and records of an ongoing investigation until the completion of all formal proceedings. Reports of the Joint Appeals Board will be routinely sent to the Ombudsman unless the appellant objects. It should be stressed that, for many years now, staff associations can receive Joint Appeals Board reports and can consult them if the appellants do not object.

6. The Ombudsman shall not be compelled by any United Nations official to testify about concerns brought to his/her attention.

7. The Ombudsman may consider a conflict of any nature related to employment by the United Nations. "Conflict" is to be construed in its broadest sense and includes, inter alia, matters pertaining to the administration of benefits, conditions of employment, managerial practices, as well as professional and staff relations matters.

8. The Ombudsman may hear any of the parties involved in a conflict who want to avail themselves of his/her services. Parties can be self-referred, or referred to the Ombudsman by any other sources. As necessary, the Ombudsman shall refer staff to the other means of conflict resolution.

9. The Ombudsman shall remain neutral, and shall not assume the role of advocate for any party. The Ombudsman will, in the exercise of his/her judgement, advise staff of their options and of the different avenues open to them. S/he will facilitate conflict resolution, using conciliation, informal mediation or any other appropriate means for the primary objective of settling conflicts between parties and obviate recourse to the formal grievance process. The Ombudsman will not have decision-making powers, but will advise and make suggestions or recommendations, as appropriate, on actions needed to settle conflicts, taking into account the rights and obligations existing between the Organization and the staff member.

10. The Ombudsman may, at his/her discretion, decline to consider conflicts that can be remedied only by actions affecting the staff at large or all the members of a category of staff, or that the Ombudsman considers have not been brought to his/her attention in a timely manner, or that appear to be frivolous.

11. The Ombudsman may request the Joint Appeals Board to extend the normal time limit for filing an appeal within the framework of staff rule 111.2.

12. The Ombudsman shall provide reports regularly to the Secretary-General. The reports shall include an overview of the Ombudsman's activities and comments on policies, procedures and practices that have come to his/her attention.

13. The Ombudsman may be consulted on policy issues where his/her views and experience may prove helpful.